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In The
Supreme Court Of The United States

OCTOBER TERM, 1954

No. [redacted] 69

ROBERT T. ORTON
Petitioner Appellant

v.

UNITED STATES
Respondent Appellee

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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To The Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Robert T. Orton, who was heretofore tried and convicted, along with Hubert Earl Hoffler, Rubin Pierce, Henry Bryant Denby, Joseph Roughton, Gordon Emmett Lemirande, Seldon Guy Hoffler, and William

Henry Johnson, in the District Court of the United States for the Eastern District of Virginia (Norfolk Division), and whose convictions were affirmed by the United States Court of Appeals of the Fourth District, Richmond, Virginia, on the 12th day of April, 1955, showeth to the Court:

(a) Petitioner (along with the seven others named above) was convicted of the offense of conspiracy to violate the Internal Revenue Laws of the United States (Title 18, Section 371, U.S.C.); and this Petitioner seeks a review and a reversal of this case, (in so far as Petitioner is concerned), which was affirmed by the United States Circuit Court of Appeals on the 12th day of April, 1955, in case No. 6944, under the style of *Robert T. Orton, et al,* v. *United States,* the opinion of which has not been published, but is printed and set forth hereto as an appendix to this petition. A memorandum of the opinion of the trial judge in the district was given, but not published, under date of the 10th day of January, 1955, and certified as a part of the proceedings, and will be found on Page 37 annexed to Appellant's brief in the Circuit Court of Appeals and certified as a part of the proceedings in the United States Court of Appeals.

BASIS OF JURISDICTION

(b) The grounds upon which the jurisdiction of this Court is sought to be invoked are:

i The conviction was based upon Title 18, Section 371, U. S. C. concerning conspiracy to violate the Internal Revenue Laws of the United States; that the order of the United States Court of Appeals for the Fourth Circuit, entered April 12, 1955, is sought to be reviewed and reversed because of its conflict with other Circuit Courts of Appeal,

and the importance of having the supplemental instruction given by the trial court, and affirmed by the Court of Appeals, reviewed. The supplemental instruction sought to be reviewed is set forth in the Appendix to Appellant's brief in the Court of Appeals, and certified as a part of the record herein.

ii Petitioner further alleges that in this case, while only one conspiracy was alleged, two conspiracies were shown; that one was formed in the State of Virginia, while the other was formed in Hertford County, North Carolina, and therefore constituted a variance, and the evidence concerning each conspiracy was admitted and considered as evidence against this Petitioner, regardless of the fact that there was no evidence of any connection that this Petitioner had with either of said conspiracies, other than the merest suspicion and conjecture.

iii That there was no substantial evidence, either direct or circumstantial, that this Petitioner had any part or connection with the alleged conspiracy, or conspiracies, upon which he was convicted, and thus deprived of his constitutional rights. Jurisdictional authority of the Supreme Court is Title 18, Section 3772, U.S.C. The Petitioner, Robert T. Orton is confined in Federal Reformatory, Petersburg, Virginia.

QUESTIONS PRESENTED

1. Whether the trial court was in error in calling in the jury from its deliberations and giving the supplemental instruction as set forth in this petition, when the jury had only been in deliberation for an hour and a half, and had not given any indication of a disagreement, or deadlock?

2. Whether the trial court was in error in giving said

instruction without any such safeguards as the presumption of innocence, the burden of proof, the requirements of proof beyond a reasonable doubt, or admonishing the jury that such supplemental instruction was to be considered in connection with the main charge?

3. Whether the trial court was in error in attempting to give what is known as the "Allen Instruction" when there was added to the said supplemental instruction the argumentative portion of the opinion of the Supreme Court?

4. Whether there were, in fact, two conspiracies shown in the trial of said case?

5. Whether there was sufficient evidence upon which to base a conviction?

STATEMENT OF THE CASE

Robert T. Orton, Petitioner, and his codefendants in the court below, were convicted of the violation of Title 18, Section 371, were charged with committing a conspiracy to defraud the United States by the several defendants, and with conspiring to manufacture, transport, and dispense intoxicating liquors, without paying the required tax thereon, etc.

The facts with respect to Robert T. Orton, Petitioner, did not disclose any connection with the illicit manufacture of liquor, the transportation of same, or any other connection with the alleged conspiracy other than the merest suspicion or conjecture. Without reference to the various acts proven as to the codefendants of the petitioner, Robert T. Orton, some of whom were unquestionably engaged in the violation of the revenue laws, and must necessarily have had a common understanding to violate the laws of the

United States, it is submitted that this Petitioner had no part in any of the alleged violations.

Admittedly, the evidence does disclose that Robert T. Orton, Rubin Pierce, and Hubert Earl Hoffler about September 1952, formed a partnership to buy and sell used automobiles. The venture was only operated a short time, and the license for the operation of same was surrendered on January 27, 1953.

Robert T. Orton had theretofore been engaged in the building business, and had two houses which he had been unable to sell, and could not further operate as a builder until he disposed of same. He went upon the sales lot of this partnership for some two months, and found that he was not making any money, and ceased to assist in its operation. He sold his houses and went back into the building business.

The evidence disclosed that in the past few years he had erected from ten to fifteen residences, and two motels, and in addition had performed other contracting work, and that he was a busy man; that he performed the larger part of the work himself, only hiring for portions of the work he could not perform.

At no time during the period that Hoffler, Orton and Pierce were operating the used car lot, or garage, was there ever an automobile, truck or other vehicle shown to have been used on or from this place of business in any of the illegal operations charged in the indictment or overt acts.

The following are all of the instances that could have any possible bearing as to Petitioner, Robert T. Orton.

A 1947 Ford truck was claimed to have been purchased by Robert T. Orton and Rubin Pierce from the Pittman

Equipment Co., and titled in the name of Joseph Beale. Robert T. Orton denied that he purchased said truck, or had any connection therewith. The transfer was not made to Robert T. Orton. It was purchased by Rubin Pierce who had the same titled in the name of Joseph Beale. Orton never had possession of this truck, but it was shown to have been sold to Rubin Pierce, who titled in Joseph Beale. Mrs. Otis B. Hines, stated definitely (typewritten transcript pp. 70-71) that she recognized the fictitious name of Joseph Beale as Rubin Pierce. The 1947 Ford truck was never shown to have been illegally used in the transportation of illegal material or equipment. All that was shown was that Rubin Pierce titled the truck in the name Joseph Beale. The car was never shown to have been at or near the Auto Sales & Service. This 1947 Ford truck was traded by Rubin Pierce as Joseph Beale for the 1948 International truck on January 24, 1953, and sold on January 28, 1953, to *Thomas Earl Knight*, an alleged fictitious name. It was this 1948 International truck which was found abandoned in West Norfolk on April 16, 1953, with a load of untaxed whiskey. At the time of the seizure, this truck was still titled in the name of Thomas Earl Knight. That Rubin Pierce used the alias of Joseph Beale is positively shown by the testimony of Mrs. Otis B. Hines (typewritten transcript pp. 70-71), who positively identified Rubin Pierce as the party who represented himself as Joseph Beale when he purchased the 1947 Ford truck, Mrs. Hines having filled out the transfer papers stated that at the time of filling out the papers no one was present but Joseph Beale. Mrs. Hines also identified him at the trial. Robert T. Orton, in his testimony admitted that he was at the Cavalier Motor Company on January 24, and purchased a new car trading in a 1950 Ford on the new car. He produced a duplicate receipt in evidence from the Cavalier Motor Company showing a transaction in detail. He also produced in

evidence a duplicate invoice from the Cavalier Motor Company of the International truck sold on the same day to Joseph Beale, showing that Beale traded in a 1947 Ford one and one-half ton truck on the International truck. Orton further testified positively that while he saw Rubin Pierce and Hubert Earl Hoffler at the Cavalier Motor Company he had no knowledge of any trade made as to the 1947 Ford Truck and the International Harvester Truck on that day, and did not take any part in the transaction whatsoever. The two duplicate receipts are shown with the testimony of Robert T. Orton (typewritten transcript pp. 290-292).

An attempt was made on the part of the Government to show that Robert T. Orton was, in fact, the real purchaser of the 1948 International truck from the Cavalier Motor Company by one H. Lee Williams. Admittedly, Robert T. Orton was at the Cavalier Motor Company on the day of the sale, and purchased a new Ford car, while Rubin Pierce, as Joseph Beale, traded for the 1948 International truck. Williams' testimony was very indefinite as will be noted on Page 96 of the typewritten transcript. Williams said in reply to the following question:

> Q Do you remember in whose name the truck was registered that was purchased from Cavalier Motor Company?
>
> A "This particular time was a double deal. At the time they were buying the truck, another man which at that time was the sales manager, was handling the truck deal. And so I don't remember who signed the papers on the truck, but I do know who signed them on the car."

The only other circumstance shown by the Government

as to Robert T. Orton's connection with the alleged conspiracy was the statement of Bernard L. Berry, a Policeman of the City of Portsmouth, Virginia, who, when asked in effect what occurred on the night of April 29th concerning certain persons involving a whiskey violation, and to tell just what occurred, and to identify the people who were there, testified as follows:

> A "Yes Sir, on April the 29th, 1953, at approximately 7:45 P.M., I was driving police car on South Truxton Avenue, the City of Portsmouth . . .

Objection to reading from notes interposed.

> (Continuing) "On this date I was driving a police car in the City of Portsmouth. As I got to the intersection of Martin Avenue and Truxton Avenue, I looked to my left and about fifty feet down from my left, and facing me in the middle of the street was a 1946 grey automobile. There was one man whom I recognized as Rubin Pierce bending over some cartons on the outside of the right hand side of the car. On the left hand side of the car there was two cartons sitting, and a fellow whom I recognized as Robert Orton was standing beside an open car door."

The witness went on to say, in effect, that they got in the car and speeded away, and that Pierce and Orton were arrested and tried, and acquitted.

There was no evidence that either party was loading or attempting to load or unload the cartons. Upon investigation the cartons consisted mostly of stagnated water.

The learned Judge of the Court of Appeals who wrote the

opinion affirming the judgment of the District Court, said in his opinion, near the end of the second paragraph that:

> "On April 29th, 1953, Orton and Pierce were seen handling liquor in another automobile in Portsmouth."

The learned Judge was evidently misled by the statement of the District Attorney, who asserted in his brief, in effect, that they (Orton and Pierce) were transferring some whisky either in or out of an automobile . . . and that the police officer definitely testified that they were together, that they were acting in concert to move whiskey, etc.

The trial judge in his memorandum of opinion, second paragraph, states:

> ". . . The evidence proves conclusively that the defendants, Pierce, Denby, Roughton and Johnson, were operating (or had been operating) a still in North Carolina. There is no affirmative evidence linking Orton, Hubert Hoffler, Lemirande, or Seldon Hoffler with the North Carolina *overt* act. There is evidence connecting Pierce and Orton, Pierce and Hubert Hoffler, Denby and Seldon Hoffler, Roughton and Lemirande, Roughton and Seldon Hoffler, Hubert Hoffler and Seldon Hoffler."

According to the memorandum of opinion, therefore, the only connection of Orton was with Pierce and Hubert Hoffler; and the only connection that Orton had with Hubert Earl Hoffler was the partnership at the used car lot automobile sale business. There is therefore no evidence linking Orton with Hoffler as to any illegal overt acts whatsoever, and, as to linking Orton with Rubin Pierce, any acts shown were entirely unrelated to any agreement or

confederation. There is no evidence that Orton ever represented himself as Beale or Knight or used any alias. He never had possession or anything whatever to do with any car, material or otherwise, in connection with the alleged conspiracy.

There is no evidence linking Orton with the still in North Carolina. This is so stated by the trial court in its memorandum of opinion by the trial judge. And it might well be stated that there is not a scintilla of evidence in any way linking the Petitioner with the Nansemond County still in Virginia. The only attempt that the Government made was an effort to link Orton with Rubin Pierce in the following manner, that is with respect to the purchase of the 1947 Ford from the Pittman Equipment Company by Rubin Pierce in the name of Joseph Beale, and the trade-in of this 1947 Ford to the Cavalier Motor Company by Rubin Pierce on the 1948 International truck, which at the direction of Rubin Pierce was titled in Thomas Earl Knight. There is no evidence that Orton ever represented himself as Beale or ever had possession of either the 1947 Ford or the International truck, or knew that Rubin Pierce was using the name of Joseph Beale as an alias.

ARGUMENT

It is respectfully submitted that the trial court committed error in giving the supplemental instructions to the jury in isolation of the main charge and without such safeguards as to the right of the defendant to the presumption of innocence, the burden of proof, and proof beyond a reasonable doubt.

The instant case involved ten defendants, numerous witnesses and required considerable time in presenting the case

to the court and jury. The jury had not indicated a disagreement or its inability to agree when called in from their deliberations after an hour and a half for submission of the supplemental instruction—a much shorter time than any of the reported cases discloses. As shown by many of the reported cases, the jury had deliberated from three hours to several days before the court thought it proper to give a supplemental charge.

In this connection, we call attention to the elapsed time from the beginning of the deliberation in other cases, before such supplementary charges were given, to wit:

In *Burton* v. *United States,* (196 U.S., 283); 25 S. Ct. 248), the jury deliberated thirty-six hours before the supplementary instructions were given.

In *Boehm* v. *United States,* (123 Fed. (2d) 812), the jury had been out 26 hours.

In *Weathers* v. *United States,* (126 F. (2d), 119), the jury had announced a hopeless division. Hours not given.

In *United States* v. *Samuel Dunker* (173 F. (2d), 507), the jury had been out 12 hours out of 24.

In *Wolin* v. *United States* (211 Fed. (2d), 772), the supplementary instructions were given after 10 hours.

In *Capital Transit Company* v. *Howard* (196 Fed. (2d) 593), the matter had been before the jury for five days.

In the case of *Speak* v. *United States,* (161 F. (2d), 562), the court said:

> "The need for calling the jury into court was not very clear. After all, while the case was not a difficult one, four hours was not a particularly long time for deliberation."

In *Culp* v. *United States* (131 F. (2d), 101), after the jury had deliberated until the following day, the supplementary instruction was given, and the court reread the former instructions.

In *Johnson* v. *United States,* (5F. (2d) 471), where the jury had been considering the verdict for three days, when the supplementary charge was given, the trial judge said:

> "Let me now add, without detracting from what I said in the former charge . . ."

Evidently, the trial judge in the instant case intended to give what is known as the "Allen Instruction" taken from the case of *Allen* v. *United States* (164 U.S., 492; 17 S. Ct. 154). However this instruction was only given in abbreviated form in the opinion of the Supreme Court. The opinion only purported to give a portion of the instruction. The court in the Allen case said, in effect, that the instruction (given in the court below) "was taken literally" from the opinion of the Supreme Court of Massachusetts, in *Commonwealth* v. *Tuey* (8 Cush. 1) and *Smith* v. *State,* 49 Conn. 376, 386. The case of *Allen* v. *United States, supra,* appears not to have been reported in the court below. It will, therefore, be necessary to turn to the Tuey case in Massachusetts and the Smith case in Connecticut, to ascertain the wording of the instruction in the Allen case.

The Supreme Court in its opinion in the Allen case stated that the Allen instruction "literally" followed the Tuey case. The definition of the word "literal," and its adverbial counterpart "literally" means:

> "According to the 'letter' or the natural or usual construction and implication of a writing or express-

> ion. True to the fact; not exaggerated. Giving a strict construction; matter of fact."

An examination of the supplemental instruction given in the instant case will show that the latter portion did not follow the abbreviated form of the instruction in the Allen case, but included in the latter portion thereof an excerpt taken from the argumentative portion of the opinion and not the charge itself. *Allis* v. *United States* (155 U.S. 117; 15 S. Ct. 36; 73 F 165, 182), which preceded the Allen case, involved the question of supplemental instructions similar to the Allen case. It is fortunate that the opinion was reported from the court below, (73 F 165, 182) where the Allis instruction is given in detail and follows the Tuey case in practically identical terms. The Allis case was heard in the court below before Judge Sanborn and affirmed by the Supreme Court of the United States. This case appears to have been the first case following the decision in the Tuey case. The supplemental instruction in the Allis case, included all the safeguards such as presumption of innocence, proof beyond a reasonable doubt, etc., and in addition, the court said to the jury:

> "Of course, gentlemen of the jury, you must consider all the other parts of the charge heretofore read to you also."

In the case of *Stewart* v. *United States* (300 F. 769, 786), wherein the trial court had under consideration the question of supplementary instructions, the first part of the instructions apparently followed the Allen instruction. But the last paragraph included an argumentative portion of the opinion which did not constitute any part of the

Allen instruction, just as in the instant case. The objectional part of the instruction read as follows:

> "While undoubtedly the verdict of the jury should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the jury room. The very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves. It certainly cannot be the law that each juror should not listen with deference to the arguments and with a distrust of his own judgment if he finds a large majority of the jury taking a different view of the case from what he does himself. It cannot be that such juror should go to the jury room with a blind determination that the verdict shall represent his opinion of the case at that moment, or that he should close his ears to the arguments of men who are equally honest and intelligent as himself."

As to this instruction, Judge Sanborn said: (300 F. 786).

> "This paragraph of the opinion in the Allen case, as we have said, was no part of the charge of the court in that case, but it was a part of the argument of the Supreme Court of the standard and approved charge in that case, and was intended to show the absurdity of a stubborn refusal of a juror to listen to the arguments of his fellows, or to consider anything but the conclusion he had reached before the jury had returned to deliberate. There is no evidence in this case that any juror had not listened with deference to the arguments of the majority, or that any juror went to the jury room with a blind determination that the verdict should

represent his opinion of the case at the time he entered that room, or that any juror had closed his ears to the arguments of men equally honest and intelligent with himself."

It will be noted that the latter portion of the supplementary instruction in the instant case was in substance identical with that above.

Judge Sanborn further said in his opinion on pages 786, 787 of his opinion:

> "As was said by the Supreme Court (25 S. Ct., 250), in the Burton case:
>
> "A slight thing may have turned the balance against the accused under the circumstances shown by the record" (196 U.S., 397; 25 S. Ct., 250),

and Judge Sanborn further said,

> "The supplemental charge and especially the excerpt from the opinion in the Allen case were more than a slight thing, and our conclusion is that they bore too hard upon the convictions of the minority of the jury, and that an impartial and fair administration of justice will be served by a new trial of this case."

The court also quoted the following in this case:

> "As was said by Judge Hook of the charge in *St. Louis' etc.*, v. *Bishard* (147 F., 496, 502; 78 C.C.A. 62), the charge itself was not sufficiently guarded; its tendency was to bring the minority to an agreement with the others, even against the dictates of their own judgment."

In *Nigro* v. *United States* (4 F. 2d. 781), the same error was made in the court below as that in the case of *Stewart* v. *United States, supra,* and the Circuit Court of Appeals reversed the Nigro case upon the same grounds as that of the Stewart case.

The opinion in the Nigro case said:

> "As pointed out by the Court in the Stewart case, a correct form for such supplementary charge may be found in *Commonwealth* v. *Tuey* (8 Cush. (Mass.) 1), and in *U. S.* v. *Allis,* (73 F. 165). The charge in the Tuey case was approved in *Allis* v. *U. S.* (155 U.S., 117; 15 S. Ct., 36); *Allen* v. *U. S.,* (164 U.S. 492; 17 S. Ct., 154); *St. Louis* v. *S. F. & R. Company* (147 F. 406).

It is submitted that a supplemental instruction of this nature if given without the usual safeguards of presumption of innocence, burden of proof, etc., and without admonishing the jury that the main charge should be considered along with the supplementary charge, could easily mislead the jury to the conclusion that the supplemental instruction was a substitute and given in lieu of the former charge.

It is evident that if such safeguards are not contained in a supplemental instruction of this nature, the question as to presumption of innocence, burden of proof, etc., which had been given in the main charge would lose much of its force and effect.

Another departure of the instruction in the instant case which is included in the argumentative portion of the instruction in the instant case is:

> "A juror should listen with deference to the argu-

ments with a *distrust* of his own judgment if he finds a large majority of the jury taking a different view . . . ." etc.

In so far as we can ascertain, this phrase has not been supported by the courts. The Tuey case contained this expression:

". . . and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows."

To distrust the weight or sufficiency of the evidence, is one thing, and the distrust of one's judgment, is quite another.

It would be paradoxical to state:

"It is the duty of jurors to decide cases if they can conscientiously do so."

And in the next breath to advise that:

"A juror should listen with deference to the arguments and with a distrust of his own judgment," etc.

It is submitted that the logical effect of an instruction of this nature is tantamount to "coercion."

In *Berger* v. *United States* (62 F. 2d., 10th Cir. 438 on page 440), the court said:

"We are further of the opinion that where a court gives a supplemental charge of the character given in the instant case (even where it omits the inquiry as to how the jury stood numerically) it should again call the

jury's attention to the presumption of innocence, the burden of proof and the requirement that guilt must be established beyond a reasonable doubt; and should state that it is the duty of each juror to perform his duty honestly and conscientiously according to the law and the evidence and not to surrender his conscientious convictions unless properly safeguarded. *Stewart* v. *United States* (300 F. 769, 785); an approved charge which so safeguarded may be found in *United States* v. *Allis* (73 F. 165)."

The learned trial judge in the instant case, on page 378 of the transcript said:

". . . and, as I previously pointed out, the case of *Apodaca* v. *U. S.* (188 F. 2d, 939) which you gentlemen representing defendants have cited, the lower court gave the exact supplemental instruction that I gave."

While the opinion does not appear to have been reported in the District Court in *Apodaca* v. *U. S.*, the opinion in the Apodaca case (188 F. 2d., 939), does not give the full instruction, but only the mere substance. However, the Court, in the Apodaca case, said in its opinion:

"In *Allis* v. *U. S.* (155 U. S., 117); (15 S. Ct. 36), an instruction couched in substantially the same, if not the identical language as that involved here, was expressly approved. However, the instruction given in the Allis case was not set out in full in 155 U. S., 117, but is set out in the Allis case in 73 F. 165, 182."

Therefore, the Court of Appeals was entirely wrong in

the Apodaca case in stating that the instruction was couched in substantially the same, if not in the identical language, as in the Allis case, as reference to the decision of *U. S.* v. *Allis* (73 F. 165, 182) will indicate where the Allis instruction was fully set forth. The Allis case, like the Tuey case, contained all of the safeguards as to presumption of innocence, proof beyond reasonable doubt, etc.

The Apodaca case was, therefore, decided under a misapprehension as to the contents of the instruction in the Allis case, since the opinion stated that it was couched in almost, if not, the identical language, as that of the Allis case. The Allis case contained the safeguards in the trial court. The Apodaca case did not. But be this as it may, the Apodaca case turned on the failure to except to the supplementary instruction.

In the instant case, the Court took the words "and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows" out of context; and in addition thereto, changed the same to "a juror should listen . . . with a distrust of *his own judgment*, if he finds a large majority of the jury taking a different view." (Italics ours).

The learned trial judge set forth in Appendix I of Appellee's brief his remarks denying defendant's motion to set aside the verdict said:

> "It is true in the Allen case, cited in 164 U. S. 492, that obviously a part of my supplemental charge was taken from the language in the Allen case, in a discussion of the charge of the lower court. But, certainly, it is not error for this Court to tell the jury what is correctly stated by the highest court of this land."

The learned Chief Judge of the Circuit Court of Appeals in

commenting in his opinion as to the departure of the instruction in the instant case from the Tuey case, held that such departure was entirely immaterial; that the language in the opinion in the Allen case is good sense and good law and the trial court was justified in following it without regard to whether it followed strictly the language of the state court instruction.

In 14 R.C.L. 757, it is said (text):

> "The opinions of appellate courts are intended for the information of the legal profession. They form a part of a course of reasoning to a conclusion. The reasoning may be of interest to the profession, but it is the principle of law involved which should be given to the juries for their guidance. Academic discussions, considerations and reasons, however correct and apt they may be, can accomplish little else than to bewilder and confuse the average jury and should not be employed in its instruction to them."

In *Notary* v. *U. S.*, 16 F. 2d 434, the Court said:

> "The practice has often been condemned of citing instances or decisions of courts in other cases to juries in connection with instructions.
>
> "It almost invariably leads, as in the present case, to an argumentive instruction. While in this case the instruction may not have been prejudicial, we deem it proper to make pronouncement of our disapproval of the practice."

In *Lisansky* v. *United States,* 31 F Ed 852 (4th Cir.) Judge Parker said:

> "Jurors are not versed in legal terminology; and it

must be clear that the language of a judicial opinion is not always, or indeed generally, appropriate for use in a charge."

1.

WHETHER ONE OR MORE CONSPIRACIES WERE INVOLVED

It is the contention of Petitioner that two conspiracies were involved, one concerning an illicit distillery in Nansemond County, Virginia, and the other in Hertford County, North Carolina. The indictment charged only a single conspiracy in Virginia. As to the distillery in Virginia the same was not in operation at the time of seizure, but was about ready for operation. No one was found at the distillery upon the arrival of officers but later in the same night four parties arrived within 150 feet of the distillery carrying materials and supplies. These parties were arrested. Petitioner Orton was not among the parties. The parties arrested near the still were Henry Bryant Denby, Joseph Roughton, Gordon Emmett Lemirande, and Seldon Guy Hoffler. None of the vehicles upon which materials were transported near this still were ever shown to be titled, owned or used by Petitioner Orton. Nor was it ever shown by any evidence that Orton had any connection whatsoever with the Nansemond still.

As to the North Carolina distillery (located in a different judicial district) a conspiracy was definitely shown by the Government when Edward P. Baker, an elderly man in Hertford County, North Carolina, entered into an agreement with Rubin Pierce to permit Pierce to put an unregistered still on his land for a rental of $50 a week. This was unquestionably a conspiracy, the overt act being committed when Pierce paid Baker $50 for rental thereof.

The trial judge of the district court in his memorandum of opinion said:

> ". . . There is no affirmative evidence linking Orton, Hubert Hoffler, Lemirande, or Seldon Hoffler with the North Carolina *overt act*. There is evidence connecting Pierce and Orton, Pierce and Hubert Hoffler, Denby and Seldon Hoffler, Roughton and Lemirande, Roughton and Seldon Hoffler, Hubert Hoffler and Seldon Hoffler."

It will be observed from the above expression of the trial court that there was no connection shown between Orton and the North Carolina distillery and that the only connection that Orton had with any of the other defendants was with Rubin Pierce and Hubert Hoffler, neither of whom was shown to have had any connection with the Nansemond County distillery in Virginia except that Orton, Pierce and Hubert Hoffler were for a short time connected in the operation of a used car lot. There was no evidence or intimation of petitioner's connection with either distillery.

It is submitted that a separate conspiracy was formed in respect to each of said distilleries one of which was located in the eastern district of Virginia, and the other in the eastern district of North Carolina, and that the rule laid down in *Berger* v. *United States,* 295 U. S. 78; 55 S. Ct. 629, and *Kotteakos, et al* v. *United States,* 328 U. S. 750; 66 S. Ct. 1239 does apply. In the Kotteakos case the court said:

> "With all deference we disagree with that conclusion and with the ruling that the permeating error did not affect 'the substantial rights of the parties.' That

right, in each instance, was the right not to be tried en masse for the conglomeration of distinct and separate offenses committed by others as shown by this record.

* * *

"The greater looseness generally allowed for specifying the offense and its details, for receiving proof and generally in the conduct of the trial, becomes magnified as the numbers involved increase. Here, if anywhere, cf. *Bollenbach* v. *United States*, 376 U. S. 614, extraordinary precaution is required, not only that instructions shall not mislead, but that they shall scrupulously safeguard each defendant individually, as far as possible, from loss of identity in the mass. Indeed, the instructions often become, in such cases, his principal protection against unwarranted imputation of guilt from others' conduct. Here also it is of special importance that plain error be not too readily taken to be harmless."

In the instant case ten defendants were involved. There were 29 witnesses examined. The evidence, motions, and charges to the jury consisted of 379 typewritten pages. At times the attorneys as well as the court were confused concerning the testimony.

A significant fact is that when the jury brought in the verdict, the verdict at first included Rudolph F. Edwards as guilty along with the other nine convicted and that it was necessary for the court to intervene that Rudolph Edwards had been excluded, since his name was at first included amongst those convicted. This is indicative of the fact that the jury may have considered the guilt or innocence en masse and apparently their distinct, and individual guilt or innocence was not properly considered.

2.

INSUFFICIENCY OF EVIDENCE AS TO PETITIONER

Attention is called to the testimony of Charles A. Flynn, Special Investigator, Alcohol and Tobacco Tax Division, who stated (typewritten transcript 185-187) in response to a question on cross examination wherein Mr. Flynn was asked in effect the following: Whether the auto sales on George Washington Highway had been under surveillance and cased by you and some of your assistants.

A. "Yes, sir."

Q. "And also the motel of Robert Orton?"

A. "Well when it was being built we were out that way. We would stop and talk to Orton."

Upon questioning the investigator said in effect that he never saw the International truck but did see other trucks they had under suspicion, but did not see any evidence of any storage of raw material that would go into the manufailure of liquor such as meal, rye, yeast or sugar. The investigator was then asked the following question:

Q. "When Mr. Orton was doing this work out there on the motel he had one or two trucks there and a tractor out there, didn't he, and he was doing some work for the adjoining farmers."

A. "I think so, yes." . . . .

Q. "And from your investigation out there, Mr. Orton had been productively employed."

A. "He is a pretty hard worker. Yes, sir."

Also it will be noted (typewritten transcript page 193),

William T. McFarland, an investigator for the Government, in fact passed where Petitioner was constructing houses on numerous occasions and would see Mr. Orton at legitimate work. And on page 194 he said in effect that he had ridden around the auto sales and service several times and made observations there and that he had not observed any of the vehicles spoken of, etc., in 1950 he saw a chartreuse Ford leave the auto sales.

NOTE: This was the same Ford that Orton traded to the Cavalier Motor Company, and no question was raised in any way as to its illegal use.

Petitioner went upon the stand (typewritten transcript page 286) and specifically denied his connection in any manner with the conspiracy alleged. He denied that he had ever been at the Pittman Equipment Company where Rubin Pierce purchased the 1947 Ford. He admitted that he was at Cavalier Motor Company January 24, 1953, when he traded a 1950 Ford for a new Ford car but denied that he had any connection with the trade which Rubin Pierce made under the alias of Joseph Beale for the 1948 International truck that was later found on a vacant lot loaded with illegal whiskey and titled in the name of Thomas Earl Knight.

The Petitioner also filed with his evidence the receipt showing the purchase of the 1953 Ford from Cavalier Motor Company in exchange for the 1950 Ford. He also procured and filed with this evidence a duplicate receipt of the transaction by which Rubin Pierce, as Joseph Beale traded the 1947 Ford truck for the 1948 International truck which was likewise titled in the name of Joseph Beale, and filed same as exhibits with his testimony.

There is, however, the statement of Policeman Bernard L. Berry (typewritten transcript page 129) in which he testified in effect that on April 29, 1953, in the City of

Portsmouth he saw Robert T. Orton standing beside the open door of a car while Rubin Pierce was bending over and apparently looking at some cartons on the outside of the right hand side of the car. There was nothing seen in the way of loading or unloading such cartons in the car and nothing shown that either Orton or Pierce knew what the cartons contained. There is evidence that both Orton and Pierce got into the car and out-distanced the officer. At any rate both Pierce and Orton were prosecuted and acquitted. It is also significant that no connection was shown between this action and the other conspirators; and it is, therefore, at least an unrelated action.

It is not unreasonable to assume that the average person would probably stop and at least take a view of some cartons on the street. It is likewise significant that Petitioner was merely standing about the open door of his car.

CONCLUSION

In conclusion, it is submitted that a writ of certiorari should be granted herein; that the verdict and rulings of the courts below should be reviewed and reversed; that the supplemental instruction complained of should be reviewed by reason of its conflict with the various circuit courts of appeal; that the question involved with respect to this instruction should be clarified and harmonized for the benefit of the legal profession and the courts below; that there is a variance and a lack of jurisdiction involved herein by reason of the fact that instead of showing a single conspiracy two definite conspiracies were proven; that the evidence submitted in the court below was insufficient upon which to base a conviction as to Petitioner; that the evidence is insufficient; and that said case should be reviewed and reversed in so far as the Petitioner is concerned.

ROBERT T. ORTON

By VIRGIL H. GOODE
Attorney for Petitioner
Rocky Mount, Virginia

APPENDIX I

[Caption Omitted]

No. 6944.

(Argued March 9, 1955. Decided April 12, 1955.)

Before PARKER, Chief Judge, and SOPER and DOBIE, Circuit Judges.

Clyde W. Cooper and Virgil H. Goode for Appellants, and L. S. Parsons, Jr., United States Attorney, (John M. Hollis, Assistant United States Attorney, on brief) for Appellee.

PARKER, Chief Judge:

This is an appeal by eight persons who were convicted in the court below of conspiracy to manufacture, remove and conceal distilled spirits in violation of the internal revenue laws. The indictment alleged twenty-nine overt acts done in furtherance of the conspiracy, including the operation of illicit distilleries in Nansemond County, Virginia, and Hertford County, North Carolina. The defendants contend: (1) that verdict should have been directed in their

behalf because the proof showed disconnected conspiracies and no general conspiracy and, as to certain of the defendants, that it failed to connect them with any conspiracy, and (2) that the court erred in giving the jury the "Allen" instruction with respect to agreeing on a verdict. We do not think there is merit in either contention.

The evidence, which on the motion for directed verdict must be taken in the light most favorable to the prosecution, clearly tends to establish the existence of the criminal conspiracy charged on the part of all of the defendants who were convicted. A conspiracy is properly thought of as a partnership in criminal purposes (*United States* v. *Kissel* 218 U.S. 601, 608; *Short* v. *United States* 4 Cir 91 F. 2d 614); and those who, with knowledge that such partnership exists, aid or assist in carrying out its criminal purposes make themselves parties thereto and are equally guilty with the original conspirators. *Comeriato* v. *United States* 4 Cir. 58 F. 2d 557, 558; *Simpson* v. *United States* 4 Cir. 11 F. 2d 593. The evidence here, taken as a whole, leaves no doubt that a general conspiracy or partnership in criminal purposes existed for violation of the internal revenue laws relating to liquor and that those defendants who were not originally parties thereto, as the workers at the stills, made themselves parties by aiding and assisting in the carrying out of its criminal purposes. We think, also, that the evidence sufficiently establishes one general conspiracy and not two unrelated undertakings. While two distilling operations are shown, the evidence shows the connection of the defendants with both operations in such a way as to justify the conclusion that both were carried on by the same criminal partnership.

The facts are that the defendants Orton, Pierce and H. E. Hoffler formed a partnership in 1952 for the ostensible purpose of dealing in second hand cars and that S. G. Hoffler

was a brother of H. E. Hoffler and was working for him. The business license of this partnership was cancelled in January 1953. The evidence does not show that the partnership engaged in any legitimate business, but does show that the members acquired cars which were shown to have been used in the business of liquor running and illicit distilling. Thus, defendant H. E. Hoffler on October 2, 1952, purchased a 1940 Ford Sedan, which was "souped up" for high speed driving, was transferred into the name of Joseph E. Goodman, an apparently fictitious person, and was seized at the time of the seizure of the Nansemond County still on May 14, 1953, where it had been driven by S. G. Hoffler. On August 19, 1952, defendant Pierce in company with defendant Orton acquired a 1947 Ford Truck in the fictitious name of Joseph Beale. Pierce, Orton and H. E. Hoffler were present when this truck was traded to the Cavalier Motor Company for an International truck, which was shown to have been used by Pierce in hauling large quantities of rye meal purchased by him in March and April 1953 in the name of Knight, another fictitious person, and which was seized on April 16, 1953 in West Norfolk loaded with illegal liquor. On April 29, 1953, Orton and Pierce were seen hauling liquor in another automobile in Portsmouth.

When the illicit distillery in Nansemond County was seized on May 14, 1953, the defendants Denby, Roughton, Lemirande and S. G. Hoffler were arrested in the immediate neighborhood. Denby and Hoffler, before they were arrested, were observed by the officer to make two trips from a parked automobile to the still. Roughton, who was later arrested at the Hertford County still, came up in a truck containing fourteen one hundred pound bags of sugar, and Lemirande came up in another truck containing twenty-three fifty gallon barrels and thirty-two one pound packages of yeast.

Before the seizure of the Nansemond County still, defendant Pierce about March 1, 1953 had talked with one Baker about locating a still on the farm of the latter in Hertford County, North Carolina. About June 1, 1953, after the Nansemond County seizure, he returned with a truck loaded with barrels and set up a still. He made two $50 payments as rent to Baker and two $50 payments were made by Denby. The still was seized July 26, 1953. One of the men working at it was Roughton, who had been arrested previously at the still in Nansemond County. Two others arrested at the still at the same time were the defendant Johnson and one Edwards who was acquitted.

This evidence was certainly sufficient to justify the jury in finding that the same group that had been operating in Virginia was conducting the operation in Hertford County, that Orton, Pierce and H. E. Hoffler were connected with the group engaged in the liquor business, as well as the men who were caught at the stills, and that those who were working at the stills must have known that they were assisting a group engaged in violating the law. This was sufficient to establish their guilt. It was not necessary that they know the full extent of the conspiracy or all the persons who were engaged in it. *Short* v. *United States, supra,* 91 F. 2d 614, 617; *Frankfeld* v. *United States,* 4 Cir. 198 F. 2d 679, 686. As the evidence justified the finding of a single, over-all conspiracy, it is not necessary that we decide whether the rule of *Kotteakos* v. *United States* 328 U.S. 750 would be applied if the existence of two unrelated conspiracies had been established, or whether such a variance between allegation and proof would be treated as harmless under the rule of *Berger* v. *United States* 295 U.S. 78.

The facts with regard to the giving of the Allen charge to the jury are as follows: The judge instructed the jury

fully and fairly with regard to the law of the case and the contentions of the parties, specifically charging them, towards the end of his charge, on the presumption of innocence and the burden resting upon the government "to prove a defendant guilty beyond all reasonable doubt before he can be convicted". After the jury had been out for about an hour and a half, he recalled them and gave them an additional instruction as follows:

> "I want you to know that in a large proportion of cases absolute certainty cannot be expected; and although the verdict must be the verdict of each individual juror and not just a meek acquiescence in the conclusions of his fellow jurors, yet each of you should examine the question submitted with candor and with proper regard and deference to the opinions of each other. It is the duty of jurors to decide cases if they can conscientiously do so. You should listen with the disposition to be convinced to each other's arguments. If much the larger number are for conviction, a dissenting juror should consider whether his doubt is a reasonable one which made no impression upon the minds of so many men equally honest and equally intelligent with himself. If, on the other hand, the majority is for acquittal, the minority should ask themselves whether they might not reasonably doubt the correctness of a judgment which is not concurred in by the majority. And, as I said before, while undoubtedly the verdict of the jury should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the jury room. The very object of the jury system is to secure unanimity by a comparison of views and by arguments among the jurors themselves. A juror should listen

with deference to the arguments and with a distrust of his own judgment if he finds a large majority of the jury taking a different view of the case from what he does himself. Every juror should not go to the jury room with a blind determination that the verdict shall represent his opinion of the case at that moment or that he should close his ears to the arguments of men who are equally honest and intelligent with himself."

This instruction was given as supplemental to the charge, without any inquiry as to how the jurors stood or whether they were having difficulty in reaching agreement, and without any intimation from the jury as to either of these matters. It stated the law as laid down by this court and the Supreme Court, and we see no ground for reversal in the fact that it was given. *Allen* v. *United States* 164 U.S. 492, 501; *Wolin* v. *United States* 4 Cir 211 F. 2d 770; *Lias* v. *United States* 4 Cir. 51 F. 2d 215; *Johnson* v. *United States* 4 Cir. 5 F. 2d 471, 475-476.* There was no effort on the part of the trial judge to influence or coerce the jury, and no inquiry as to how the jury was divided, the thing that was held improper in the cases of *Burton* v. *United States* 196 U.S. 283 and *United States* v. *Samuel Dunkel & Co.* 2 Cir. 173 F. 2d 506, 509.

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*See also *Allis* v. *United States* 155 U.S. 117; *Kawakita* v. *United States* 9 Cir. 190 F. 2d 506, 527-528, aff. 343 U.S. 717; *Apodaca* v. *United States* 10 Cir. 188 F. 2d 932, 939; *Wright* v. *United States* 8 Cir. 175 F. 2d 384, 388, cert. den. 338 U.S. 873; *United States* v. *Samuel Dunkel & Co.* 2 Cir. 173 F. 2d 506, 508-509, cert. den. 340 U.S. 930; *Weathers* v. *United States* 5 Cir. 126 F. 2d 118, 119-120, cert. den. 316 U.S. 681; *Boehm* v. *United States* 8 Cir. 123 F. 2d 791, 812; cert. den. 315 U.S. 300, rehearing den. 315 U.S. 828; *United States* v. *McGuire* 2 Cir. 64 F. 2d 485, 493, cert. den. 290 U.S. 645; *Dwyer* v. *United States* 2 Cir. 17 F. 2d 696, 698; cert. den. 274 U.S. 756. Cf. *Nigro* v. *United States* 8 Cir. 4 F. 2d 781; *Stewart* v. *United States* 8 Cir. 300 F. 769.

Argument is made that the language of the court in *Allen* v. *United States, supra,* departs somewhat from the instruction in *Commonwealth* v. *Tuey* 8 Cush. (Mass.) 1, upon which the instruction there approved was based. This is, of course, entirely immaterial. The language of the opinion in the Allen case is good sense and good law and the trial court was justified in following it without regard to whether it followed strictly the language of the state court instruction. Complaint is made, too, that the judge did not repeat his charge on presumption of innocence and reasonable doubt when giving the supplemental instruction; but we think he could very well assume that the jury had in mind instructions which he had given only an hour and a half before. Jurors should be given credit for having ordinary intelligence; and if there is one doctrine of the criminal law which they probably understand better than any other it is the presumption of innocence and the burden resting upon the prosecution to establish guilt beyond a reasonable doubt. Nothing said in the supplemental charge had any tendency to becloud this doctrine and there was no reason to repeat what had been said plainly with regard thereto.

There was no error and the judgment and sentence of the court below as to each of the defendants will be affirmed.

Affirmed.

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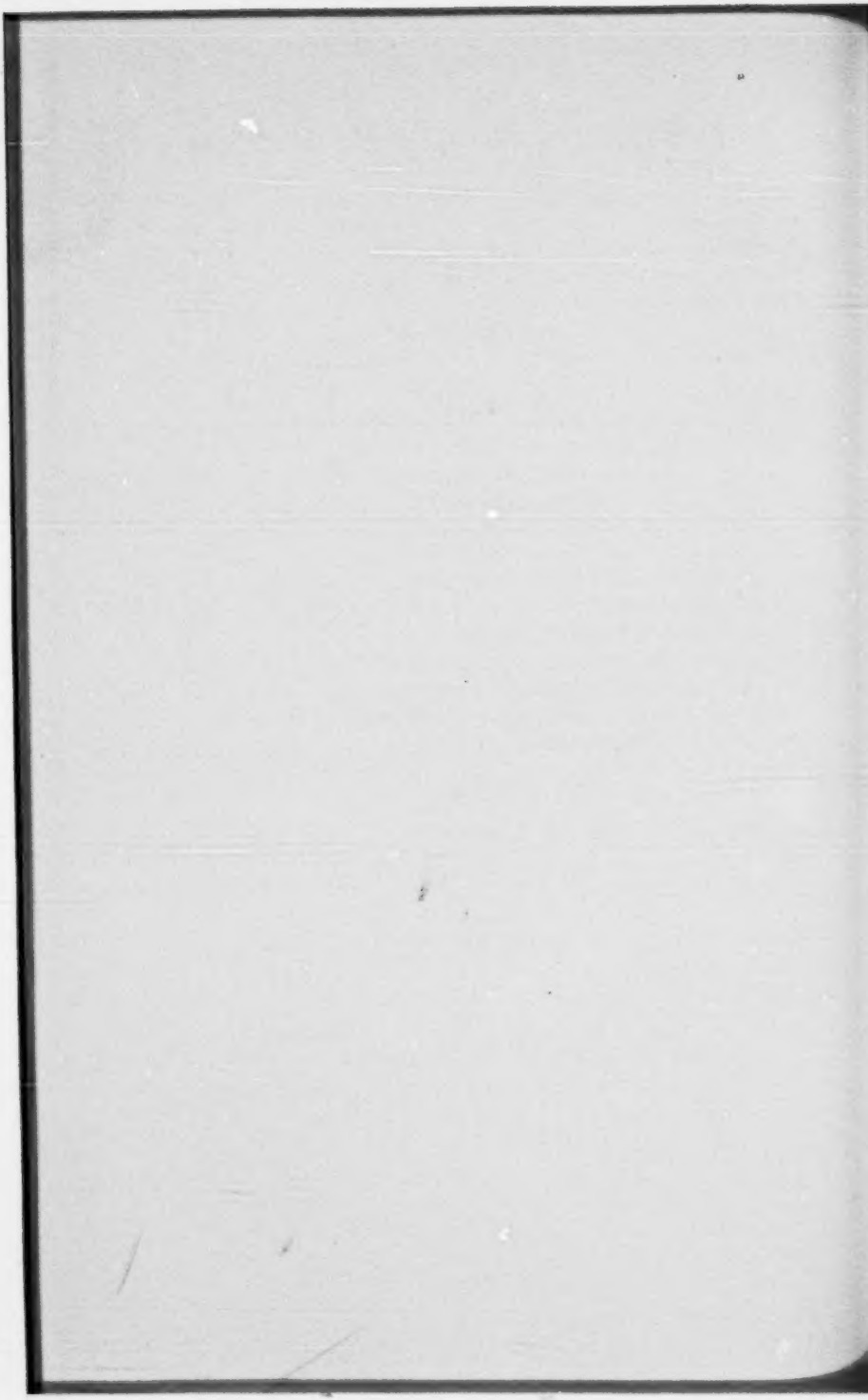

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 788

ROBERT T. ORTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 29-35, R. III, 3-9) [1] has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 1955 (Pet. 29, R. III, 11). The petition for a writ of certiorari was filed on May 12, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence sufficiently established (a) one overall conspiracy, and (b) petitioner's participation in the conspiracy.

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[1] The record references are to the complete record in the court below which is in three volumes.

2. Whether the trial court's supplemental "Allen" charge was improper either because of its wording, its timing, or the fact that it was given without the repetition of the previously given instructions as to presumption of innocence and burden of proof.

STATEMENT

The petitioner was convicted under an indictment alleging a conspiracy with others to manufacture, remove, and conceal distilled spirits in violation of the internal revenue laws. Twenty-nine overt acts were charged, including the operation of illicit distilleries in Nansemond County, Virginia and Hertford County, North Carolina. (R. I, 2-9, R. II, 359.) Petitioner was sentenced to serve three years in prison and to pay a fine of five hundred dollars. (R. I, 10.) On appeal the judgment was affirmed.

The pertinent facts adduced at trial may be summarized as follows:

The petitioner and two of the eight co-defendants, Pierce and H. E. Hoffler, formed a partnership in 1952 for the ostensible purpose of dealing in second-hand cars (R. II, 21, 22). Its license was cancelled in January 1953 (R. II, 22). On October 2, 1952, defendant Hoffler purchased a 1940 Ford sedan, which was "souped up" for high speed driving and registered in the name of a fictitious person (R. II, 28, 38-39, 180-182). On August 19, 1952, defendant Pierce, in the company of the petitioner, purchased a 1947 Ford truck in a fictitious name (R. II, 23, 63-65, 77-80, 127). The petitioner, Pierce, and

Hoffler were together when this truck was traded for a 1948 International truck which was also registered in the name of a fictitious person (R. II, 25, 95, 97-98, 125, 179). The International truck was used by Pierce in hauling large quantities of rye meal purchased in a fictitious name (R. II, 8-12) and was seized on April 16, 1953, by county police in West Norfolk, loaded with illegal liquor (R. II, 124-126). The 1940 Ford sedan was seized by United States agents on a raid of an illicit distillery in Nansemond County on May 14, 1953 (R. II, 16, 33-34), during which four other co-defendants were arrested (R. II, 50-51). On April 29, 1953, the petitioner and Pierce were seen in Portsmouth, Virginia, hauling liquor in yet another automobile (R. II, 129, 131).

About March 1, 1953, Pierce talked with a North Carolina farmer about locating a still on the latter's farm in Hertford County (R. II, 145-146). After the Nansemond County, Virginia, seizure, about June 1, 1953, Pierce returned to North Carolina, set up the still and made rental payments to the farmer (R. II, 146). Denby (previously arrested at Nansemond County) also appeared and made rental payments to the North Carolina farmer (R. II, 147-148). This still was seized on July 26, 1953 (R. II, 44-53, 167-173). Among the men arrested at this time was Roughton, previously arrested at Nansemond County, Virginia (R. II, 37, 148).

The judge instructed the jury with regard to the law of the case, specifically charging it, toward the

end of his instructions, on the presumption of innocence and the burden resting upon the prosecution to prove guilt beyond a reasonable doubt (R. II, 332-347). About an hour and a half after the jury began deliberation, the judge, after consulting with counsel, recalled the jury and gave an additional instruction as follows (R. II, 354-355):

> I want you to know that in a large proportion of cases absolute certainty cannot be expected; and although the verdict must be the verdict of each individual juror and not just a meek acquiescence in the conclusions of his fellow jurors, yet each of you should examine the question submitted with candor and with proper regard and deference to the opinions of each other. It is the duty of jurors to decide cases if they can conscientiously do so. You should listen with the disposition to be convinced to each other's arguments. If much the larger number are for conviction, a dissenting juror should consider whether his doubt is a reasonable one which made no impression upon the minds of so many men equally honest and equally intelligent with himself. If, on the other hand, the majority is for acquittal, the minority should ask themselves whether they might not reasonably doubt the correctness of a judgment which is not concurred in by the majority. And, as I said before, while undoubtedly the verdict of the jury should represent the opinion of each individual juror,

it by no means follows that opinions may not be changed by conference in the jury room. The very object of the jury system is to secure unanimity by a comparison of views and by arguments among the jurors themselves. A juror should listen with deference to the arguments and with a distrust of his own judgment if he finds a large majority of the jury taking a different view of the case from what he does himself. Every juror should not go to the jury room with a blind determination that the verdict shall represent his opinion of the case at that moment or that he should close his ears to the arguments of men who are equally honest and intelligent with himself.

ARGUMENT

1. The petitioner contends that the proof below established two disconnected conspiracies in variance from the one alleged (Pet. 21-23), and that the evidence was insufficient to connect him with any conspiracy (Pet. 24-26). However, evidence of the associations between the offenders and their recurring involvements in the overt acts alleged in Nansemond County, Virginia, and Hertford County, North Carolina, and elsewhere shows that there was one continuing conspiracy—to make, remove, and conceal illegal non-tax-paid whiskey, however and wherever it could successfully be done. For this reason the case of *Kotteakos* v. *United States*, 328 U. S. 750, cited by the petitioner, in which the evidence proved eight or more different

conspiracies by separate, unconnected groups of defendants, is inapposite. In the instant case, the jury was entitled to infer [2] that all the defendants, and specifically the petitioner, joined in an "overriding scheme" and that each participant knew "he was aiding in a larger plan." *Blumenthal* v. *United States,* 332 U. S. 539, 559.

The evidence was also sufficient to establish the guilt of the petitioner—indeed, to show that he played a significant role as an original conspirator. He was a partner in a business venture that did no apparent legitimate business (R. II, 230, 297-299); he went with members of the partnership to acquire cars later used or traded for those used in illicit distilling (R. II, 77-80, 97-98), and he fled the law together with a partner when caught hauling liquor (R. II, 130-131).

2. The petitioner charges error on the part of the trial court in giving its supplemental instruction to the jury (Pet. 10-21). He does not deny that the rule recited therein is that laid down by this Court in *Allen* v. *United States,* 164 U.S. 492, 501, but complains that the language goes beyond that of the instruction approved by that case to include language of this Court's opinion upholding the charge.[3] The particular words in the approved

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[2] The trial judge correctly charged the jury with respect to the question of fact as to the existence of separate conspiracies (R. II, 341-342).

[3] Apparently the language of the charge objected to in this case begins "And, as I said before, while undoubtedly the verdict of the jury should represent the opinion of each individual juror * * *" [See Statement, *supra,* pp. 4-5.]

instruction, of course, are not mandatory; the additional language is nothing more than an explanation and justification of the standard and approved charge, as stated by this Court. As the court below pointed out, it is good sense and good law and the trial court was justified in following it.

In attacking the charge, petitioner relies on *Stewart* v. *United States,* 300 Fed. 769, 785-876 (C. A. 8), which did criticize the use of language from the *Allen* opinion as distinct from the *Allen* charge itself. However, in the *Stewart* case the judge, before giving the supplemental charge, had elicited from the jury the information that there was a larger preponderance one way. In the instant case there was no intimation by the jury of any difficulty in reaching an agreement and no improper inquiry was made by the judge. See *Burton* v. *United States,* 196 U. S. 283. In this connection the Court of Appeals for the Second Circuit, in *United States* v. *Samuel Dunkel & Co.,* 173 F. 2d 506, 508-509, certiorari denied, 340 U.S. 930, made the following observation:

> * * * The practice followed here of discussing the dissenting jurors' responsibilities and duties in the language of Allen v. United States, supra, was also employed, in similar form, in United States v. Allis, C. C. Kan., 73 F. 165, 182, affirmed Allis v. United States, supra. As a matter of fact this charge has been often so used. United States v. Winters, 2 Cir., 158 F. 2d 674; Bord v. United States, 76

> U. S. App. D. C. 205, 133 F. 2d 313, certiorari denied 317 U. S. 671, 63 S. Ct. 77, 87 L. Ed. 539; Boehm v. United States, 8 Cir., 123 F. 2d 791, 812, certiorari denied 315 U. S. 800, 62 S. Ct. 626, 86 L. Ed. 1200. In Stewart v. United States, 8 Cir., 300 F. 769, some criticism of use of the Allen opinion in this form was expressed. We think, however, as we have previously said, that any jury unable to maintain its individual and collective independence against such a charge, standing by itself, "would have been no better than a sounding board for any judicial whisper." United States v. Olweiss, 2 Cir., 138 F. 2d 798, 801, certiorari denied Olweiss v. United States, 321 U. S. 744, 64 S. Ct. 483, 88 L. Ed. 1047. * * *

See also *Dwyer* v. *United States,* 17 F. 2d 696, 698 (C.A. 2), certiorari denied, 274 U.S. 756; *Shaffman* v. *United States,* 289 Fed. 370 (C. A. 3).

That the charge was a supplemental instruction was made clear to the jury by the judge who said (R. II, 354):

> I have in mind to give you one additional charge, which does not relate to the facts of the case in any way or the applicable law, but somewhat on the situation with respect to juries and their duties.

There was thus no need as petitioner argues (Pet. 16) to repeat any part of the main charge given only one and one-half hours earlier.

Petitioner's objection to the time when the instruction was given (Pet. 10-12) is an afterthought. The judge consulted with all counsel before making the charge and there was no objection (R. 356). After the charge was made petitioner's counsel made it clear that his objection then was directed at the wording of the charge (R. 357). Moreover, the time of recalling the jury is a matter within the discretion of the trial court. *Allis* v. *United States,* 155 U. S. 117. Here, the time of jury deliberation must be considered in relation to the issues which were not very complex.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
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WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
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